SESSION 5

Legal Issues with RSA

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Road Safety Audit

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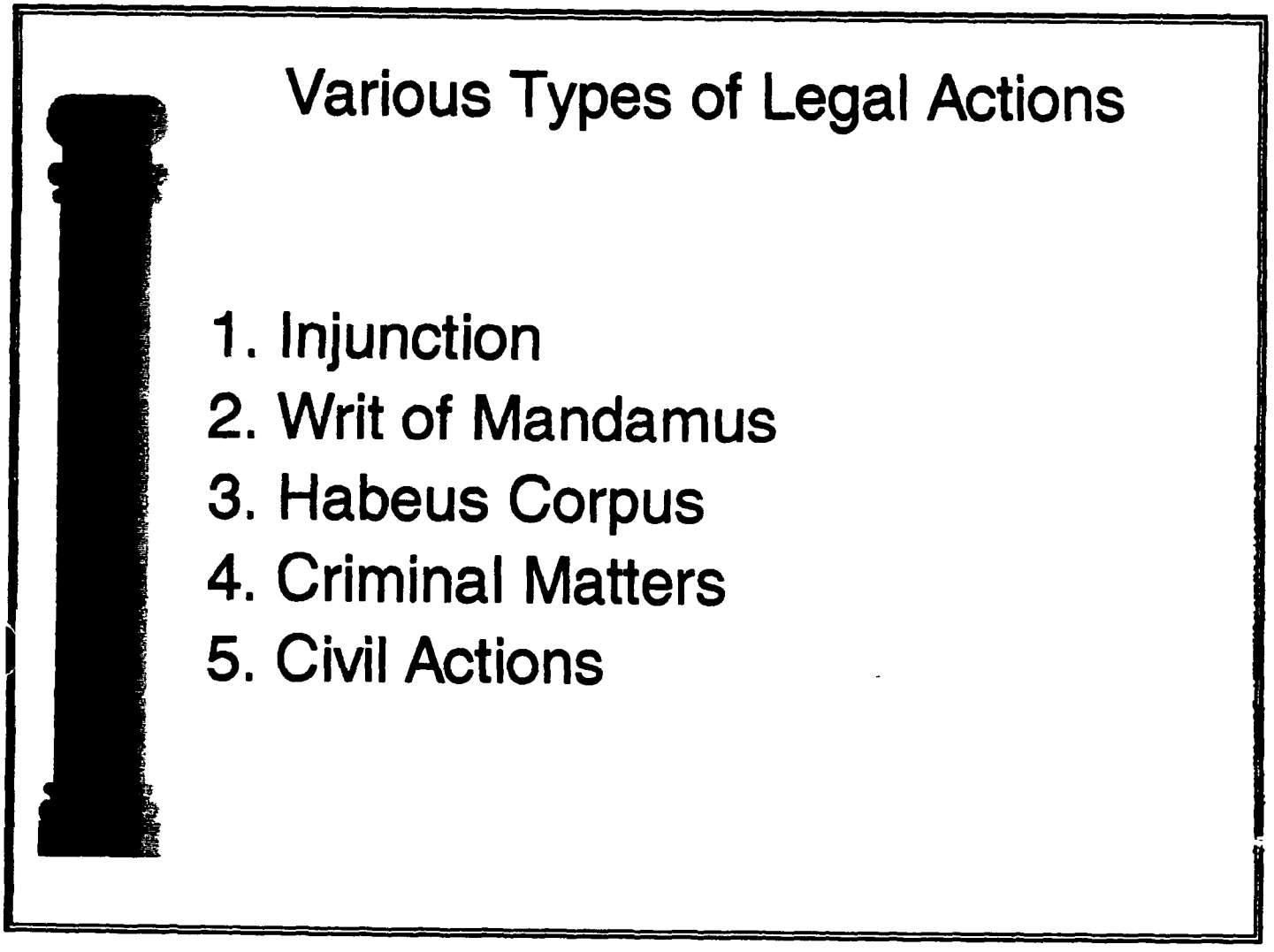
Legal Issues


Various Types of Legal Actions
1. Injunction
2. Writ of Mandamus
3. Habeus Corpus
4. Criminal Matters
5. Civil Actions

Proof Requirements

Criminal - Beyond a Reasonable Doubt

Civil - By the Perponderance of the evidence

What is a Tort?

A Tort is a private or civil wrong or injury. A wrong independent of Contract

In Every Tort Actions, three elements are necessary:

1. There must be a duty by the plaintiff to the injured party

2. A breach of that duty

3. Damage as a proximate result

The most common Tort is Negligence.

Negligence is the failure to use reasonable care in ones action

Duty & Breach of That Duty
Proximate Cause of Damage
No Contributory Negligence
Damages must Result

Contributory Negligence

1. PURE

2. Assumption of Risk

3. Comparative Negligence

Immunity - The King Can Do No Wrong

From England in the Russel Case in 1788 (The Horse The Wagon and The Poorly maintained bridge)

Government Functions:

Ministerial: Carrying out of orders (Construction and Maintenance)

Discretionary: Decision making (designs)

Liability of State & Local Governments

Courts require the states to only excercise reasoable care to make and keep the roads in a reasonable safe condition for the reasonable prudent traveler

Liability of State & Local Governments

A motorist using a public highway has the right to presume the road is safe for usual and ordinary traffic, and he or she are not required to anticipate extraordinary danger, impediments which have not been called to his and her attention

THE REASON FOR THE ROAD SAFETY AUDIT

The Design Immunity Exception (and the rise of liability and risk)

Design Immunity Exceptions

Where the Approval of a plan or design was arbitrary, unreasonable, or made without adequate consideration

Where a plan or design was prepared without adequate care

Design Immunity Exceptions

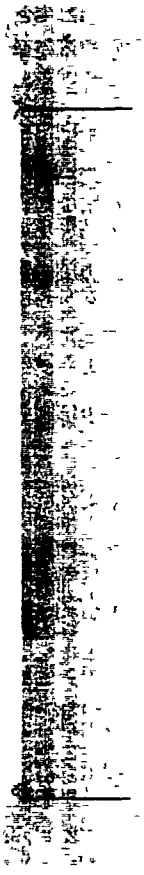
Where it contained inherent, manifestly dangerous defect or was defective from the very beginning of actual use

Where changed conditions demonstrate the need for additional remedial action (Not RSA)

Reducing Risk By the Road Safety Audit

Risk Minimization is Accomplished By the Road Safety Audit

While there are no cases involving the RSA and it application to Risk, such as if it is not used are you NEGLIGENT?



Reducing Risk By the Road Safety Audit

1. Accident Record Systems
2. Be Aware of Public Communications
3. Identify High Accident Locations
4. Improve the Warning System
5. Develop Long Range Safety Improvements

Reducing Risk By the Road Safety Audit

You Don't Want to Be The First

LIABILITY AND THE ROAD SAFETY AUDIT

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INTRODUCTION

The judicial system has continuously revisited the legal responsibility of those who operate road and street systems The courts have found that there is a legal duty to maintain the roads and streets in a reasonably safe condition for those drivers and pedestrians who are prudent in their actions in utilizing them Going back in time to 1788 in England and 1812 in the United States[1] the courts have applied this doctrine to governments who own and control the roads

The need for self protection and commercial growth was recognized by the courts as a valid reason for their decision that the roads must be maintained in a reasonably safe condition Over the years, since these original decisions, the courts have expanded this doctrine to include not only the road itself, but also any devices that provide for additional safety on the streets and roads These devises include traffic signals, signs, markings, guardrail and roadway lighting

Highways under construction, maintenance, or improvement are also included in this doctrine, to insure the safe movement of people and goods

It is an accepted fact, that to be liable in the first instance, a duty to the injured must exist Furthermore, as result of a breach of that duty, the other party must have suffered a loss, either physical (personal injury) or personal property (damaged vehicle, etc)

NEGLIGIENCE

In the area of tort law[2], where we are most concerned, the most common tort is negligence, and this is based on the failure to use reasonable care in one's action Three elements are necessary in every tort action (1) A legal duty to the plaintiff by the defendant (a special affirmative duty to prevent harm) must exist, (2) there has to be a breach of that duty, and (3) damage must result from that breach On the other hand in a negligence action, five elements must be satisfied by a preponderance (weight) of the evidence, in order for the injured to prevail It must be proved that (1) The defendant had a duty to use reasonable care towards the plaintiff (injured), (2) that that duty was breached, (the breach can be due to an act of omission or an overt act), (3) that the breach was the proximate (legal underlying) cause of the injuries or loss sustained by the plaintiff, (4) that the plaintiff did not contribute to his or her own injuries, or did so in a small way, and (5) the injured suffered an injury or a requisite loss

IMMUNITY

Despite the fact that a defendant may have violated all the elements required in a negligence suit, that defendant may still be immune to lawsuits From the early cases in English jurisprudence, particularly Russell vs The Men of Devon, decided in England in 1788, and Mower vs The Inhabitants of Leicester, decided in Massachusetts in 18121, Governments have had a unique protection The aforementioned cases created the doctrine that Since the King Could Do No Wrong, then the King's Governments Could Do No Wrong This was the beginning of Sovereign (governmental) Immunity Some thirty years passed in the United States before the Courts determined that Governments should be

held responsible for some of it tortious acts Through a series of legal cases the Courts determined that some governmental acts were purely government acts, and were protected by the doctrine that The King Could Do No Wrong Other acts of government were considered proprietary functions, (business like, or private functions) where, if a party was injured because of the breach of a duty owed to that individual by the government, he, or she, could overcome the governmental immunity, and maintain a law suit against that government

What was created was a duality of government functions If it performed a governmental function, it maintained immunity from negligence suits, but if it performed a proprietary function governmental immunity did not apply and the injured could maintain a lawsuit against the government

Even this doctrine is no longer valid Traditional Governmental or Sovereign Immunity is gone The immunity that remains falls within a governmental activity known as a discretionary activity Through the advent of changing laws, dictated by both the courts and state legislatures governments have been made more responsible for its acts, particularly where loss of property, personal injury etc , results from a breach of the duty owed the public

Basically it can be said that all government acts (formally immune) fall within two distinct categories, discretionary and ministerial (non-discretionary) A discretionary activity, as defined by the courts, is an act where a government agency or an individual authorized by a government agency to make decisions, exercises that authority There are very specific guidelines that define a discretionary act These are the authority to make the decision, that the decision is based on a review of valid alternatives, that

independent judgment is exercised in arriving at the decision, and finally, that a decision is actually made

The courts, because of the separation of powers between the administrative, legislative and judicial branches of government, have held that they would not attempt to second guess governments when they are exercising their independent decision making authority Thus immunity still exists for decision making judgments On the other hand, ministerial acts, those which follow a defined or definite standard practice or procedure, have no immunity Further the courts have consistently held that construction and maintenance are considered ministerial Therefor any loss of property or injuries that result out of an action considered ministerial will be actionable in court against a government agency

Where does an agency's risk arise for the operation of a road system? Legally, governments have not been held out to be absolute insurers of their road and highway systems They need only to maintain and operate these road systems in a reasonably safe condition, It is when they fail or breach this duty that liability to the user arises

What must be reviewed to determine liability so that appropriate risk management techniques can be established? These included would be the categories of design, implementation, operation and maintenance

DESIGN

The design function of a government agency still follows the traditional governmental immunity, falling under the "discretionary function" umbrella As noted earlier, the key to the continuation of the immunity, so that the courts will not intervene and attempt to second guess the legal validity of the design, is that the development of the design should conform with the requirements of a discretionary

function These being authority to select or prepare a design that the design was based on a set of valid alternatives, and there was the exercise of independent judgment, (without any outside influences), in arriving at the design decision If there is a breach of any of these criteria, the courts consider that the discretionary activity has been abused, and liability would then exist for the agency, should any injury or property loss occur because of this breach

A common question often asked, "is design immunity perpetual, as long as the design met the appropriate criteria when prepared, and the operational product of that design is still viable in its day to day operation"?

Case law in California[3] as well as in several other states, where perpetual design immunity has been codified into state statutes, finds that the courts have been reluctant to grant perpetual design immunity under certain conditions In the California case the court held that, "where a plan or design of a construction of, or improvement to, public property, although shown to have been reasonably approved in advance or prepared in conformity with standards previously so approved as being safe, nevertheless, in its actual operation under changed physical conditions, produces a dangerous condition of public property and causes injury, the public entity does not retain the statutory immunity from liability conferred on it by code" Simply, it means that designs are only valid as long as changed conditions have not made it inherently dangerous The courts indicate that they will not tolerate an ostrich like syndrome, sticking one's head in the sand hoping the problem will disappear

If an agency has notice of a problem, remedial steps must be taken to resolve it A risk management tool in these circumstances would be

to utilize accident histories to determine if emerging problems are beginning to occur If so, then solve the problem, and do not rely on the fact that design, is discretionary, and therefor immune A government entity may be surprised at the outcome of that attitude at a negligence trial

NOTICE OF DEFECT

Knowing about a problem means having had notice that a problem exists, and the duty to remedy or repair arises While primarily involved in in the area of liability due to improper maintenance, notice is also applicable, as it relates to continuation of design immunity When would a government's risk arise due to a design that is no longer viable or safe? This occurs when the entity has received notice of a defect, actual or constructive

Actual notice of the changed condition (or defect) means that the agency has received direct notice of the problem This can occur from observations of traffic flow by the agency's own employees or letters or other communications from the public Regardless of the source, actual notice of the changed condition, creates the duty for the agency to remedy the situation or face liability risk in the continued operation of a design that is no longer viable, and possibly dangerous to the using public

In addition to actual notice raising the specter of liability, a more serious type of notice exists and this is constructive notice Constructive notice occurs when the courts determine that the governmental entity should have known about the problem Constructive notice can arise under several conditions Most commonly, is the fact that an organization that the courts feel is an agent of the responsible organization, has received actual notice The courts are not concerned whether or not the agent has advised the responsible

operating or maintaining entity That is an internal communications matter, they are only concerned with who knew and are they an agent of that entity

Courts have also established constructive notice when an employee of the responsible entity, one who bears a definite relationship (ie Engineering Supervisor, System Designer, etc) to the situation requiring correction, has been in a position to observe the problem It is not necessary for the individual to have notified his agency That too is an internal communications matter, and the courts are not concerned if the problem was transmitted to the appropriate parties or not, just the fact that an appropriate employee knew of it

Constructive notice can also arise if the responsible agency has allowed the situation to exist for an unreasonable period of time Under these circumstances the courts create constructive notice on the basis that the problem has been allowed to exist long enough for the responsible party to have discovered the problem if they were acting in a reasonable prudent manner

Finally, constructive notice can also arise if the defect or dangerous situation exists because the agency created it by improper design, installation, or maintenance No one has to advise the agency The agency created the problem, therefor they have notice and they must remedy the situation

IMPLEMENTATION

Implementation (construction) is viewed in a more simplistic manner than design or any other function that is considered discretionary Construction as well as maintenance, have always been considered ministerial and as such, the traditional government immunity does not exist For an organization to be held liable for injuries or property losses sustained through construction procedures, the injured

need only prove that negligence occurred because of the government's activities To do that, as noted earlier, the injured need only to prove the required elements of a negligence suit, duty, breach, injury or loss due to breach, and damages

We must look to case law, if any exists, to determine the government entity's liability for injuries caused by construction Not only must case law be reviewed, but we also must look at the legal cause of the injury or property loss in order to assign liability to the government entity In every accident there are two causes that allowed it to happen First, the actual cause and secondly, the legal cause (proximate) Actual cause is easily defined by example Assume there is a malfunctioning traffic signal and one or more drivers enter the intersection controlled by that malfunctioning traffic signal without exercising due caution As a result an accident occurs The actual cause of that accident was that one or more drivers were not paying attention to the situation at the intersection However, the legal cause of an accident is more important to the litigation as it used to add parties to the law suit who have deep pockets and can afford to pay large judgments In the aforementioned accident, the legal cause of that accident, can result in a government entity being brought into the suit for improper construction (or maintenance) of the signal, which caused it to malfunction

The courts only require reasonableness in the duty to is not required to be an absolute insurer of their road system to users of the system In a negligence action against the government, based on the delay of the implementation of the system, the injured would be hard pressed to show that his or her injuries occurred as the proximate (legal) cause of that delay, and as long as any one element of a negligence suit is not met, the suit must fail

The installation of field equipment is a different issue In this situation, lapses of appropriate protective measures by a contractor or the government itself (open trenches, blocked sidewalks, improper workzone techniques) is, in essence, a simple negligence suit It is simple, because the elements of the suit should be easier to prove, particularly that the breach of the duty owed the road user was the proximate cause of the accident

CONSTRUCTION & MAINTENANCE

Are accidents that are caused by improper operation or maintenance of traffic control systems actionable?

Any study of the law will show that as time passes, the law itself becomes more sophisticated It adjusts to the growth and needs of society At one time, the public could not sue a government (sovereign or governmental immunity), now in this day and age they can

Negligent construction is not likely by reason of the discretionary function exemption, to be immune, particularly where the construction deviates from an approved plan or design, or there is negligence in implementing the plan or design, such as introducing a feature not considered in the design phase [4]

Negligent maintenance is least likely to be immune from liability Courts are prone to consider this phase of highway maintenance, a routine housekeeping function necessary in the performance of normal day-to-day government administration Maintenance of highways is exercised at the operational level, and although discretion is involved, these decisions are not policy oriented

RISK MANAGEMENT

There are tools for responsible agencies to use to reduce their risk from law suits arising from design, operation and maintenance of

road systems Among these are the development and maintenance of the expertise necessary to adequately operate and maintain existing road systems

Good records are the foundation of any good risk minimization program They are however, a double edged sword They will provide a good defense for actions against the government, as long as appropriate responses are taken when notice of a defect is observed from these records When no action is taken in response to this information these records can be utilized by the injured party, to indicate that the government entity had knowledge of a defect and there was a failure to eliminate the known hazards

A good risk management program should include an appropriate preventative maintenance program and the Road Safety Audit fits the bill in this area The Road Safety Audit seeks out problems in the field and does not rely entirely on complaints from the public or various police agencies This program should not only seek out the problems, but once found the problem must be resolved

Provisions should be established for around the clock emergency maintenance This is important, for the courts require that an agency, when they have knowledge of a defect, must remedy the situation within a reasonable period of time or they have breached their duty to the using public "Reasonable time", is never established by the courts in advance Whether an agency was reasonable in their response depends on factors peculiar to the problem (ie type of problem, location, inherent danger due to problem, etc)

The state of the law indicates that the use of Road Safety Audits should not be delayed due to liability concerns For governments, as long as there is no abuse of discretionary power, and operational reviews are utilized, immunity will continue to exist with respect to

design As for construction and and maintenance, the same operational reviews are required, along with preventative maintenance programs, adequate training, and reasonable response to known hazards What will result is an adequate risk management program for the governmental entity responsible for operation and maintenance

We must look upon liability concerns as a flag, a guide to lead us to correct problems before someone is injured We should not lose site of the fact that our end product is safety If we deliver that product, then there is no need to worry about liability

NOTES

1. **Russell vs.The Men of Devon, England 1788; Mower vs. The Inhabitants of Leicester, Mass. 1812.**

2. **Pivnik, Sheldon I., Liability in Traffic and Highway Operations, Transportation Engineering Journal, July, 1979, ASCE, Chicago, IL**

3. **Baldwin vs. State of California, 491 P.2d 1121, (CA 1972)**

4. **Pivnik, Sheldon I., Tort Liability, National Association of County Engineers Action Guide Series, 1986, Ottumwa, IA.**